No. 2568.

UNITED STATES

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

WILLIAM B. EDWARDS,
ROBERT L. CULPEPPER,
Plaintiffs in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

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OPENING BRIEF OF PLAINTIFFS IN ERROR.

I. Statement of the Case.

This cause comes to the Circuit Court of Appeals on Writ of Error to the District Court of the United States, in and for the Southern District of California, Southern Division. It is based upon an assignment of errors (Tr., pp. 90-93), and a bill of exceptions (tr., pp. 68-88), and the errors assigned and herein relied upon consist in the refusal of the District Court to give a certain instruction (tr., pp. 91-92), and in giving two certain instructions (tr., pp. 92-93), and in overruling motion for new trial (tr., p. 93), and in entering judgment and pronouncing sentence against plaintiffs in error. (Tr., p. 93.)

There is but one question involved on the writ of error, and that is purely one of law raised by the specifications of error herein, wherein error in refusing an instruction requested by plaintiffs in error, and in the giving of certain others by the District Court is claimed.

The question raised, briefly stated is:

Is the action of local land officials in permitting and receiving the filing of a homestead application, based solely upon a preference right of entry, theretofore awarded to the applicant by the land department at the successful termination of a contest of an entry upon lands, while withdrawn from all form of public entry under the reclamation act, and the allowance by the local land officials of such homestead entry upon such preference right, long after the thirty day notice required by law, but after the restoration of said lands to entry, within the jurisdiction of the land officials, and does such action confer such a right as is embraced within the terms of section 19 of the Penal Code of the United States?

Such is the question herein roughly stated. It will develop and appear with perfect clearness only after a consideration of the facts as embodied in the bill of exceptions herein, and the law relative to the subject embracing the question.

II. Specification of Errors.

Plaintiffs in error herein specify the following errors, relied upon and herein asserted and urged:

1st. Error of the District Court in refusing to give

the following instruction requested by plaintiffs in error: (Tr., pp. 51-2, 91.)

"You are instructed that under the laws of the United States a right, called a preference right, is created and vested in the successful contestant of any homestead entry made and filed on any public land of the United States.

"You are further instructed that such preference right as created by law gives to such successful contestant the right, above all others, to enter the lands involved in the contest, within thirty days after notice of of the cancellation of such former entry by the commissioner of the general land office.

"You are further instructed that, if during the thirty days succeeding such notice the said land shave been and remain withdrawn from all forms of entry, the said preference right becomes extinct and is of no further force nor effect.

"You are further instructed that no rule, regulation nor decision of any of the officers of the land department of the United States can extend such right beyond the thirty days above stated, and that no ruling, action or decision of the land department or any of its officers, extending such right or granting such right, can create or give the successful contestant any preferred right of entry or settlement on such land. And if you believe from the evidence in this case that Patrick H. Bodkin and James M. Ocheltree, respectively, secured a preference right as above described but did not exercise it within thirty days after notice of the cancellation by

the Commissioner of the General Land Office of the contested entry, by filing an entry upon the land involved in such contests. respectively, then you are instructed that such preference right became extinct, and any ruling or decision, made thereafter, by any of the officers of the land department, based upon such preferred right, was null and void and conferred no right upon said Bodkin or said Ocheltree which is embraced in, or protected by section 19 of the Penal Code of the United States, under which these defendants are are indicted, and you must thererefore acquit tthe defendants."

2nd. Errors of the District Court in giving the following isstructions: (Tr., pp. 50, 92.)

"The Court further instructs you, that the said Ocheltree, by virtue of the allowance on June 1st, 1912, at the United States Land Office, Los Angeles, California, of his application previously filed in said office, to-wit: May 18th, 1910, to enter as a homestead the land described in said first count, acquired the right, by the constitution and laws of the United States, to make settlement and residence upon said land and cultivate the same, and in other respects comply with the public land laws of the United States relating to homesteads, so as to earn and procure title to said land."

3rd. Error of the District Court in giving the following instructions: (Tr., pp. 51, 93.)

"The Court further instructs you, that the said Bodkin, by virtue of the allowance on June 1st, 1912, at the United States Land Office, Los Angeles, California,

of the application previously filed in said office, to-wit: May 18th, 1910, to enter as a homestead the land described in said second count, acquired the right, by the constitution and laws of the United States, to make settlement and residence upon said land and cultivate the same and in other respects comply with the public land laws of the United States, relating to homesteads, so as to earn and procure title to the said lands."

4th. Error of the District Court in overruling the motion for a new trial and not allowing the same. (Tr., p. 93.)

5th. Error of the District Court in entering judgment and in pronouncing sentence against the defendants, William B. Edwards and Robert L. Culpepper. (Tr., p. 93.)

III. The Indictment. (Tr., pp. 5, 18.)

Plaintiffs in error, with four others, were indicted by the grand jury of the United States within and for the Southern Division of the Southern District of California, on July 11th, 1913, for conspiracy to injure, oppress, threaten and intimidate two citizens of the United States, namely: one James M. Ocheltree and one Patrick H. Bodkin, in the free exercise of a right and privilege secured to them by the constitution and laws of the United States, to-wit: the right to make and perfect certain homestead entries on two quarter sections of land in the Palo Verde Valley, Riverside County, California. The indictment is found under

section 19 of the Penal Code of the United States, approved in 1910, and contains two counts.

First Count. (Tr., pp. 5-12.

Briefly stated, the first count alleges that the plaintiffs in error and four others conspired to deprive one James M. Ocheltree of a right to make settlement and residence upon a certain quarter section of land, described therein, by threats and force. The indictment alleges that on May 18th, 1910, said Ocheltree was in all respects qualified to take and enter public land of the United States, and especially to make and perfect the homestead entry thereinafter mentioned; that on May 18th, 1910, said Ochtltree made and filed in the land office at Los Angeles, his application and declaretion under oath, to enter as a homestead a certain quarter section of land, therein described; that thereafter, on June 1st, 1912, declaration was duly and regularly allowed by the Register and Receiver, and said Ocheltree was allowed to, and did enter as a homestead the said tract of land; that ever since said Ocheltree has been and now is the owner of and entitled to the exercise and possession of all rights flowing from said homestead application and entry, including the right to make settlement and residence upon said tract of land, and to live and reside upon the same, and to cultivate and improve the same in the manner required by the public land laws of the United States relating to homesteads; that on November 6th, 1912, said Ocheltree attempted to make settlement and residence on the

said lands and that plaintiffs in error and others conspired, combined, confederated and agreed together to prevent said Ocheltree from so doing. This count then proceeds to set forth overt acts of the accused, but it is unnecesary to review them here.

Second Count. (Tr., pp. 12-18.)

The second count is almost precisely the same in form and language as the first, with only the difference of name, the description of the quarter section, and the overt acts.

Briefly it alleges that one Patrick H. Bodkin was on May 18th, 1910, qualified to take and enter public lands of the United States and especially to make and perfect the homestead entry described in the indictment; that on May 18th, 1910, said Bodkin made and filed in the land office at Los Angeles, his application to enter as a homestead a quarter section of land therein described; and that on June 1st, 1912, said application was duly allowed by the Register and Receiver, and said Bodkin was allowed to, and did enter as a homestead, the said tract of land; that on November 25th, 1912, said Bodkin attempted to make settlement and residence on said land, but that plaintiffs in error and others conspired to injure, oppress, threaten and intimidate said Bodkin in the free exercise of the right to make settlement on said land and to cultivate and improve the same as required by the public land laws relating to homesteads. This count then proceeds to outline the conspiracy and

to set forth overt acts committed to carry out its purposes.

Upon this indictment the trial proceeded, occupying nearly three weeks, and resulting in a verdict of guilty as to the two plaintiffs in error, not guilty as to three, and a disagreement as to one.

Plaintiffs in error thereafter duly moved for a new trial (Tr., p. 63-4,) which was denied (Tr., p. 59,) and exception duly taken and noted (Tr., p. 59,) and the judgment of the court was thereupon pronounced (Tr., pp. 59-60.)

IV. Statement of Facts.

Upon the trial the undisputed facts, relating to the two quarter sections described in the indictment, and the alleged rights of Ocheltree and Bodkin to make homestead entry thereon respectively, were shown in evidence as set forth herein by the bill of exceptions (Tr., pp. 68-88.)

From that it appears that from September 12, 1903, until May 18, 1910, the lands described in the indictment, and to which the alleged preference rights of homestead refer, were withdrawn from all forms of public entry, under and by virtue of the Act of June 17, 1902, commonly called the Reclamation Act, said lands, during that period, having been withdrawn under what is commonly called "First Form Withdrawal."

It also appears that while said lands were so withdrawn, said Ocheltree contested the entry upon the quarter section described in the first count, theretofore made by one Danford Arnold, and that the land depart-

ment allowed such contest to proceed, and on September 30, 1908, the Arnold entry was canceled, and a preference right awarded by the land department to said Ocheltree, to enter thereon under the homestead laws, and that notice of this preference right was duly served on Ocheltree in October, 1908, while said lands were still withdrawn.

It also appears that while said lands were so withdrawn said Bodkin contested the homestead entry on the quarter section, described in the second count, theretofore made by one Edwards, who is plaintiff in error herein; that the land department allowed such contest to proceed, and on June 25th, 1909, the commissioner of the general land office canceled the Edwards entry and awarded to Bodkin a preference right to enter said quarter section as a homestead; and that Bodkin was duly notified of such cancellation prior to January 1st, 1910, while said lands were still withdrawn.

That on January 10, 1910, an order was made by the Land Department restoring the lands described in the indictment, with other lands, to public settlement on April 18, 1910, and to public entry on May 18th, 1910.

Thereafter on April 18, 1910, Robert L. Culpepper, plaintiff in error herein, settled on the quarter section described in the first count, and on May 18, 1910, filed his application for a homestead thereon. But on the same day, to-wit: May 18, 1910, said Ochiltree filed his application for a homestead thereon, upon the basis and by virtue of the preference right theretofore granted him by the land department on September 30, 1908.

Also on April 18, 1910, William B. Edwards, plaintiff in error herein, settled on the quarter section described in the second count, and on May 18, 1910, filed his application for a homestead thereon. But on the same day, to-wit: May 18, 1910, said Bodkin filed his application for a homestead thereon, upon the basis and by virtue of the preference right theretofore granted him by the land department on June 25th, 1909.

All these applications were then suspended, pending a contest between the State of California and the United States as to the character of the lands, but on May 22, 1912, were again restored to public entry.

Thereupon, to-wit: on June 1, 1912, the local land officials canceled the Edwards entry and allowed the Bodkin entry solely by virtue of the so-called preference right theretofore awarded to Bodkin on June 25, 1909; and on June 3, 1912, canceled the Culpepper application and allowed the Ocheltree application solely by virtue of the preference right awarded Ocheltree on September 30, 1908.

It further appears from the facts proven that both Culpepper and Edwards had made settlement on the quarter sections, respectively, on April 18th, 1910, pursuant to the order of restoration, and we believe we are justified in claiming that they thereby gained a settler's preference right, respectively,—of which more hereafter,—but that the officers of the land department assumed that the so-called reference rights awarded by them to Ocheltree and Bodkin, respectively, were vested,

and paramount to the rights of all others including settlers, and this brings us to the real question in this case.

V. The Question Herein.

Can the Land Department, by awarding a preference right of entry to the successful contestant of an entry on lands, while withdrawn under the first form withdrawal of the Reclamation Act, and by recognizing such preference right as paramount to all others within thirty days after notice of restoration of such lands to public entry, although not exercised within thirty days after notice of such preference right, create, or confer a right on such successful contestant as is contemplated by, or included in, Section 19 of the United States Penal Code?

Or, to put it in another form: Has the Land Department authority and jurisdiction to suspend the preference right, as defined and created by the Act of May 14, 1880, when awarded at the successful termination of a contest of an entry on lands withdrawn from all forms of public entry, and while said lands are so withdrawn, so as to keep such preference right alive beyond the thirty days' notice of the cancellation of the entry, given by the local land officials, as required by said Act?

To each of these questions, plaintiffs in error say that "no" is the correct answer, and to persuade this honorable court that such is the correct answer, we will now proceed to consult law, logic and reason.

VI. Argument.

Section 19 the Penal Code, of the United States of 1910, under which the indictment herein is found, pro-

vides that "if two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of *any right* or *privileges secured to him by the constitution or laws of the United States*, (italics ours,") they shall be punished, etc.

In discussing this section which was formerly Section 5508 of the Revised Statutes, the Supreme Court of the United States in United States vs. Cruikshank, 92 U. S., 542, said:

"To bring this case under the operation of the statute therefore, it must appear that the right, the enjoyment of which the conspirators intended to hinder or prevent, was one granted or secured by the constitution or laws of the United States. If it does not so appear, the criminal matter charged has not been made indictable by any Act of Congress."

And again in United States vs. Waddell, 112 U. S., 76, the same court announced:

"The protection of this section extends to no other right, to no right or privilege dependent on a law or laws of the State. Its object is to guaranty safety and protection to persons in the exercise of *rights dependent on the laws of the United States*, *including*, *of course*, *the constitution and treaties*, *as well as statutes*, and it does not in this section at least, design to protect any other rights. The right assailed, obstructed, and its exercise prevented as set out in this petition, is very clearly a right wholly dependent upon the Act of Congress concerning the settlement and sale of public lands of the United States. No such right ex-

ists or can exist outside of an Act of Congress." (Italics ours.)

The Act Creating Preference Right.

By the Act of May 14, 1880, (21 Stat., 140,) Congress created the preference right known to our lands laws as follows:

"Sec. 2. In all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead, or timber culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation and *shall be allowed thirty days from date of such notice to enter said lands.*" (Italics ours.)

Thus we see that in creating this preference right Congress expressly limited its existence to a period of thirty days from notice by the local land officer, nor is there any other Act of Congress which affects or modifies this limitation so as to prolong or extend its existence beyond the thirty days prescribed.

Discussing the preference right, the Supreme Court of Oklahoma in the case of Reaves vs. Oliver, 41 Pac., 353, says:

"A contestant for a preference right, has no right, under the law to occupy the land, as against the entryman, but when the entry is canceled, as a result of his contest and the preference right is awarded under the Act of Congress of May 14, 1880, his rights relate back to the initiation of his contest and no settlement made

on the land or contest initiated subsequent to the initiation of his contest can defeat his right to enter the land, or take from him the right to possession, *if he follows up his right and make the homestead entry within the time allowed by law.*'' (Italics ours.)

In the case at bar, neither Ocheltree nor Bodkin, exercised their alleged preference rights within thirty days after notice of such by the land office, for the apparent reason that they could not do so, the lands involved being withdrawn from all forms of public entry. But the Land Department assumed to keep such rights alive beyond the period of thirty days, and allowed to each of the successful contestants the right to enter the lands described as against all other persons, within thirty days after the lands were restored to public entry, and made the allowance of their applications, respectively, solely by virtue of the so-called preference right.

The allowance by the land office of the applications of Ocheltree and Bodkin, based on preference rights theretofore awarded, could give them no more rights than the preference right itself embraced or was imbued with, and if the preference right, when sought to be exercised, was defunct, or void, or had expired by limitation of the statute creating it, then the action of the Land Department was void, and no right was acquired by Ocheltree or Bodkin by virtue of the allowance of the application based thereon.

In support of this contention, we call this honorable court's attention to the language of the Supreme Court in Maddox vs. Burnham, 156 U. S., 544, where it says:

"It is true that he claims that he had permission from the register of the land office to go upon the land and occupy it, but the register had no power to give such permission; he had no general control over the unappropriated public lands; *he could vest no rights, legal or equitable, in any individual other than such as are authorized by statute.*" (Italics ours.)

That there is no statute nor other authority for the action of the local land office in allowing the applications of Ocheltree and Bodkin on June 1, 1912, because and by virtue of their alleged preference rights, months and almost years after the statutory thirty days had expired, is amply shown by the decisions, rules, regulations and instructions of the General Land Office up to and after the allowance of said applications on June 1, 1912, hereinafter set out.

And Congress itself has made a distinction which amounts almost to construction as to the life of these preference rights as affected by withdrawals under authority of acts of Congress by the enactment of the act of March 3, 1911, wherein section 2 reads as follows:

"Sec. 2. That in all cases where contests were initiated under the provisions of the act of May 14, 1880, prior to the withdrawals of the lands for national forest purposes, the qualified successful contestants may exercise their preference right to enter the land within six months after the passage of this act." (36 Stat. 1084.)

Here we see Congress deliberately saving and protecting and extending the preference right of successful contestants over entries on lands withdrawn for national

forest purposes, but no where except in the decisions of the land department, hereinafter cited and reviewed, can we find any such change or modification of the preference right awarded to successful contestants over entries on lands withdrawn under the first form withdrawal provided for in the reclamation act.

Two years before the passage of this act of Congress, the general land office rendered, on February 17, 1909, this decision:

"The act of May 14, 1880, does not confer upon a successful contestant *a vested* right to enter the land, but merely a preferred right of entry for thirty days as against everyone except the United States.

"Where after the cancellation of an entry as the result of a contest, but prior to exercise by the contestant of his preferred right, the land is withdrawn for inclusion within a national forest the contestant's *preference right is thereby defeated.*" (Italics ours.)

Case of David A. Cameron, 37 L. D., 450.

And long before, on December 11, 1894, Secretary of the Interior Smith, wrote this opinion for the general land office:

"The application of Davis was rejected by the local office because 'the land is shown by our records to be part of the "Sierra Forest Reserve," as defined by the proclamation of the president, transmitted to this office by the honorable commissioner's letter "P" of March 21, 1893.' From this rejection Davis appealed, claiming that he had a preference right of entry of said lands because he was a successful contestant of one Bacon,

whose entry was held for cancellation by departmental decision of March 13, 1893, and his rights were preserved by the President's proclamation making said forest reserve. * * * *

"The land applied for was included within the reservation referred to, and said reservation took the same beyond the operation of the land laws, and being by authority of law and not containing a provision excepting the right of successful contestants from the force and effect of the reservation, *it destroyed any privilege which the applicant might otherwise have had, had said reservation not been made.*" (Italics ours.)

Case of Jefferson E. Davis, 19 L. D., 489.

And again on May 9, 1900, the following opinion was written by Secretary of the Interior Hitchcock:

"Whatever preferred right a contestant may have on the cancellation of the entry under attack, *is defeated by an intervening proclamation* by the President declaring the establishment of a forest reservation that includes the land embraced within the contested entry." (Italics ours.

Case of Schmith, 30 L. D., 6.

Also on March 27, 1911, Assistant Secretary of the Interior Pierce, in construing section 2 of the act of March 3, 1911, just enacted, and relating to preference rights of successful contestants as affected by forest reserve withdrawals, rendered the following decision:

"This case is in the same condition in respect to this as it would be had Titus sought to make homestead entry. He could not make such entry because the land

was segregated under the homestead entries against which his contests were then still pending. *It is well settled under then subsisting law that reservation of land to public use defeats the preference right of a contestant*" (Italics ours.)

Case of Santa Fe Pacific R. R. Co., 39 L. D., 611.

On February 25th, 1904, Secretary of the Interior Hitchcock wrote the following decision:

"The rule is so settled as to need no citation of authority that the contestant's preference right is personal and cannot be assigned or waived in favor of another, *but that on failare of the contestant to exercise his preference right within the time limited, the entry of the first legal applicant must be allowed.*"

Schilling vs. Fuller, 32 L. D., 466.

And again on January 18, 1910, First Assistant Secretary of the Interior Pierce, wrote this decision:

"January 6, 1908, Ness was notified of his preference right of entry by registered mail and he received this notice on January 8, 1908, as shown by his signature to the registry return receipt. *His preference right of thirty days therefore commenced to run on January 9,* (the day he received the notice being excluded.) *His preference right expired February 7, 1908.*" (Italics ours.)

Finley vs. Ness, 38 L. D., 394.

Shortly after the passage of the act of May 14, 1880, to-wit: on August 31, 1886, the land department rendered this decision:

"*Failure to assert the preference right of entry within the statutory period after cancellation deprives the successful contestant of all rights gained by the contest.*" (Italics ours.)

Hollants vs. Sullivan, 5 L. D., 115.

In a decision rendered December 28th, 1895, the general land office announced:

"*But the law requiring a successful contestant to complete his entry within thirty days from date of notice of cancellation*, and that notice to an authorized attorney of record is notice to the party he represents, *is too well established to call for discussion.* There is no question that Gariss *failed to perfect his homestead entry within thirty days from date of notice of cancellation. Hence any rights that he may have must depend on his ability to show that he was an actual settler in good faith at the date of Borin's entry.*" (Italics ours.)

Gariss vs. Borin, 21 L. D., 542.

We have heretofore chiefly dwelt upon the law concerning preference rights and the decisions concerning the same, without reference to the Reclamation Act of June 17th, 1902, but as that Act seriously affected such rights and intimately concerns this case, we now will endeavor to assist the court in comprehending the changes caused by that Act and by the withdrawals thereunder.

The Reclamation Act. (32 Stat., 388.)

On June 17, 1902, Congress passed the Act commonly called "The Reclamation Act," by the terms of

which the Secretary of the Interior is given power to withdraw from public entry the lands required for any irrigation works contemplated under the provisions of the Act, and to restore to public entry any of the lands so withdrawn, when, in his judgment such lands are not required for the purposes of the Act; and the Secretary of the Interior is also authorized at or immediately prior to the time of beginning surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works, provided that all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms and conditions of the Act.

Thus we see there are two classes of withdrawal authorized by this Act: One commonly known as "withdrawals under the first form," which embraces lands that may possibly be needed in the construction and maintenance of irrigation works, and the other commonly known as "withdrawals under the second form," which embraces lands not supposed to be needed in the actual construction and maintenance of irrigation works, but which may possibly be irrigated from such works. (See Circular June 6, 1905, 33 L. D., 607.)

Lands withdrawn under the first form cannot be entered, selected, or located in any manner as long as they remain so withdrawn, and all applications for such entries, selections, or locations, should be rejected and denied regardless of whether they were presented before

or after the date of such withdrawal, and regardless also of the fact that any application may be based upon a settlement made before such withdrawal.

(See Circular June 6, 1905, *supra.*)

Lands withdrawn under the second form, however, can be entered only under the homestead laws, and subject to the provisions, limitations, charges, terms and conditions of the Act, and also applications to make selections, locations or entries of any other kind should be rejected.

(See Circular June 6, 1905, *supra.*)

Section 10 of this Act further authorizes the Secretary of the Interior to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of the Act into full force and effect.

After the passage of this Act the burden of its execution fell upon the Secretary of the Interior, and his construction of its terms, and the effect of its provisions upon preference rights procured by successful contests, become important in a consideration of the question herein raised. And no better way of presenting the construction of this executive officer can be found, than the quotation of the instructions, rules and regulations promulgated by the Secretary, concerning the Reclamation Act and contest of public land entries. And we herewith present in chronological order the rules in point:

Rules, Regulations and Instructions of the Secretary of the Interior, Relating to Reclamation and Contests.

1. **Circular of June 6, 1905.** (33 L. D., 607.)

The first expression of the Department of the Interior on this subject appears in the Circular of June 6, 1905, sections six and seven of which are as follows:

"Sixth. Any entry embracing lands included within any withdrawal, made under either of the forms mentioned, whether such entry was made before or after the date of such withdrawal, may be contested and canceled because of entryman's failure to comply with the law or for any other sufficient reason, *and any contestant who secures the cancellation of such entry and pays the land office fees, occasioned by his contest, will be awarded a preferred right of making entry under the Reclamation Act, provided the lands involved are not embraced within a withdrawal of the first form.* (Italics ours.)

"Seventh. When any entry for lands embraced within a withdrawal under the first form is canceled by reason of contest or for any other reason, such lands become subject immediately to such withdrawal and cannot, thereafter, so long as they remain so withdrawn, be entered or otherwise appropriated, either by a successful contestant or any other person; but any contestant who gains a preferred right to enter any such lands may exercise that right at any time within thirty days from notice that the lands involved have been released from such withdrawal and made subject to entry."

Section six, above quoted, expressly denies a preference right to a successful contestant of an entry on

lands included within a first form withdrawal. This regulation remained in this form until January 19, 1909, when a much stronger declaration and regulation was enunciated; and in this connection it is well to remember that while the lands described in count number one of the indictment herein, were withdrawn under the first form withdrawal, the contest of Ocheltree against the Arnold entry was filed, allowed, and on September 30, 1908, the Arnold entry was canceled and a preference right awarded to Ocheltree by the Land Department, notice of which was served on him in October, 1908. (Tr., pp. 82-84.) And it is also well to remember that during the same time of withdrawal under the first form of the lands described in count number two of the indictment, the contest of Bodkin against Edwards was filed, allowed, and on June 25, 1909, the Edwards entry was canceled by the commissioner and a preference right of entry thereon awarded to Bodkin, of which he had notice prior to January 1910, (Tr., p. 84.)

2. **Circular of January 19, 1909.** (37 L. D , 365.)

"To Registers and Receivers.

"Sirs: The provisions of the paragraphs 6 and 7 of the regulations concerning lands withdrawn under the Reclamation Act of June 17, 1902, (32 Stats., 388,) approved June 6th, 1905, (33 L. D., 607,) are hereby amended to read as follows:

"6th. No contest will be allowed against any entry embracing land included within the area of any first form withdrawal, and in all cases where a contest has

been allowed prior to such withdrawal, *the withdrawal, if made before the termination of the contest, or before entry by the successful contestant, will, ipso facto, terminate all right that was acquired by reason of such contest.* (Italics ours.)

"7th. Any entry of land embraced within the area of a second form withdrawal may be contested and, if at the date of entry by the successful contestant, the land is under second form withdrawal, his entry will be subject to the limitations and conditions of the Reclamation Act."

Thus we here find a positive declaration by the Department of the Interior, which, applied to the Ocheltree and Bodkin contests, would have terminated any preference right acquired by reason of such contests. Both the foregoing circulars indicate in the plainest of language that contests cannot be maintained against entries embraced within first form reclamation withdrawals, *so as to give birth to any preference right*, and the latter declares that the withdrawal of the lands *ipso facto* terminated all rights that Ocheltree or Bodkin might have acquired by reason of their contests, for section 6 provides and declares that even if a contest is terminated, and a preference right awarded prior to withdrawal, the withdrawal, if made prior to entry by the successful contestant, *ipso facto*, terminates such preference right.

These two sections, six and seven, as amended in 1909, were again promulgated in a circular of the land department issued May 31, 1910, embodying the law and regulations relating to reclamation of arid lands, but are therein numbered 19 and 20.

3. Circular of May 30, 1910. (38 L. D., 620-631.)

"19. No contest will be allowed against any entry embracing land included within the area of any first-form withdrawal, and in all cases where a contest has been allowed prior to such withdrawal, the withdrawal, if made before the termination of the contest or before entry by the successful contestant, will *ipso facto*, terminate all right that was acquired by reason of such contest.

"20. Any entry of land embraced within the area of a second form withdrawal may be contested, and if at the date of entry by the successful contestant the land is under second form withdrawal, his entry will be subject to the limitations and conditions of the reclamation act."

4. Circular of October 19, 1910, Relating to Contests Against Entries Embraced Within Reclamation Withdrawals. (39 L. D., 296-)

"The Honorable the Secretary of the Interior.

"Sir: In compliance with the instructions contained in your letter of October 11, 1910, it is respectfully recommended that paragraphs 19 and 20 of the circular approved May 31, 1910 (38 L. D., 620), be amended so as to read as follows:

"19. No contest will be allowed against any entry embracing land included within the area of any first form withdrawal or land reserved for irrigation purposes, commonly known as land under the second form of withdrawal, until the Secretary of the Interior shall have established the unit of acreage and fixed the water

charges, and the date when the water can be applied and made public announcement of the same, and in all cases where a contest has been allowed prior to such withdrawals, the withdrawal, if made before the termination of the contest, will *ipso facto* terminate all right that was acquired by reason of such contest. In cases where contest has been allowed as to entries on second form lands, the act of Congress approved June 25, 1910 (Public No. 289), precludes entry by successful contestants until the lands are restored to the public domain or platted to farm units and covered by public notice under section 4 of the reclamation act.

"If the approval of the act preceded the termination of the contest, all rights thereunder were *ipso facto* terminated by the act, but in all cases where a preference right has been gained by virtue of a successful contest, terminated before the withdrawal of the land or the passage of the said act, the successful contestant may exercise his right and make entry at any time within thirty days from notice that the lands involved have been restored to the public domain, or covered by public notice and made subject to entry, but, in the latter event, his entry must be made subject to the limitations, charges and conditions imposed by the reclamation act.

"20. Any entry of land embraced within the area of a second-form withdrawal may be contested after farm units have been established covering such entry, and public notice has issued in connection with the same, fixing the water charges and the date when

water can be applied, and if at the date of entry by the successful contestant, the lands have not been released from the withdrawal under the provisions of the reclamation act, his entry will be subject to the limitations, charges and conditions imposed by that act."

"The recognition of preference right in successful contestants, where contests have terminated prior to the withdrawal of the lands involved is in accordance with the present practice, and the exercise of that right is provided for in a manner similar to that set forth in the circular of June 6th, 1905. (33 L. D.. 607.)

"It is respectfully recommended that you attach your approval to this letter and cause it to be returned to this office.

Very respectfully,

FRED. DENNETT,
Commissioner.

Approved Oct. 19th, 1910,
L. A. BALLINGER, Secretary."

While the foregoing statement of rules might have been made much simpler and with less verbiage, still it is apparent that the author thereof recognizes the old rule that contests are not to be allowed against entries of lands embraced within a first-form withdrawal, for the first statement in rule 19 is: "No contest will be allowed against any entry embracing land included within the area of any first-form withdrawal;" while all the rest of the section relates to contests of entries on second-form withdrawals, and to the changes occasioned by the passage of the act of Congress of June

25, 1910 (36 Statutes, 835), in section 5 of which it is provided:

"That no entry shall hereafter be made and no entryman shall be permitted to go upon lands reserved for irrigation purposes until the Secretary of the Interior shall have established the unit of acreage and fixed the water charges and the date when the water can be applied and made public announcement of the same."

All of which relates exclusively to second-form withdrawal lands, entries on which could always theretofore be contested for cause, and a preference right awarded to the successful contestant, who could exercise it, subject however to the limitations of the reclamation act.

5. Circular of April 29, 1912, Relating to Reclamation of Arid Lands. (40 L. D. ,641.)

In this circular from which we also quote sections 10 and 15, the subject matter of contests is reduced to one section numbered 23, from which it again appears that contests of entries on lands embraced within a first-form withdrawal will not be allowed, the new rule inserting the word "private" before the word "contest."

"Sec. 10. After lands have been withdrawn under the first form they cannot be entered, selected or located in any manner so long as they remain so withdrawn, and all application for such entries, selections or locations, should be rejected and denied, regardless of whether they were presented before or after the date of such withdrawal. (See John J. Maney, 35 L. D., 250.")

"Sec. 15. Upon the cancellation of a homestead entry covering lands embraced within a withdrawal under the Reclamation Act such withdrawal becomes effective as to such lands without further order. (See Cornelius J. McNamara, 33 L. D., 520.")

"Sec. 23. No private contest will be allowed against any entry embracing land included within the area of any first form withdrawal, or land reserved for irrigation purposes, commonly known as land under the second form of withdrawal, until the Secretary of the Interior shall have established the unit of acreage and fixed the water charges, and the date when the water can be applied and made public announcement of the same. In cases where contest has been allowed as to entries on second form lands, the Act of Congress approved June 25, 1910, (36 Stat., 835,) precludes entry by successful contestants until the lands are restored to the public domain or platted to farm units and covered by public notice under Section 4 of the Reclamation Act. In all cases where a contest has been allowed prior to the withdrawal of the lands, or in the case of entries on second form lands, prior to the approval of the Act of June 25, 1910, the withdrawal attaches to the lands involved immediately on cancellation of the entry, and no rights can be obtained by the contestant in the event that the entry is canceled under the contest proceedings prior to the vacation of the order of withdrawal and opening of the lands to entry. In all cases where a preference right has been gained by virtue of a successful contest, terminated before the withdrawal of the land

or the passage of said Act, the successful contestant may exercise his right and make entry at any time within thirty days from notice that the lands involved have been restored to the public domain, or covered by public notice and made subject to entry, but, in the latter event, his entry must be made subject to the limitations, charges, and conditions imposed by the Reclamation Act."

And the rule is also somewhat changed in its terms to comply with an Act of Congress of February 18, 1911, (36 Stat., 917,) amending Section 5 of the Act of June 25, 1910, *supra*.

6. Circular of August 24, 1912, Relating to Contests of Lands Withdrawn Under the Reclamation Act.

(41 L. D., 171.)

"The Commissioner of the General Land Office.

"Sir: Through contests, and otherwise, my attention has been repeatedly directed to the regulations of of January 19th, 1909, (37 L. D., 365,) wherein the provisions of paragraphs six and seven of the regulations concerning lands withdrawn under the Reclamation Act of June 17th, 1902, (32 Stat., 388,) approved June 6, 1905, (33 L. D., 607,) were amended to read as follows:

"6th. No contest will be allowed against any entry embracing land included within the area of any first form withdrawal, and in all cases where a contest has been allowed prior to such withdrawals, the withdrawal, if made before the termination of the contest, or before entry by the successful contestant, will, *ipso facto* ter-

minate all right that was acquired by reason of such contest.

"7th. Any entry of land embraced within the area of a second-form withdrawal may be contested and, if at the date of entry by the successful contestant, the land is under second-form withdrawal, his entry will be subject to the limitations and conditions of the reclamation act."

"After a most careful consideration of the matter I am of opinion that the change made by the circular of January 19, 1909, is detrimental to public interests, believing that contests should be permitted of all claims whether within a first-form reclamation withdrawal or elsewhere, upon a sufficient charge, which if proven would avoid a claim or cause its cancellation. The regulations of January 19, 1909, are therefore revoked and paragraphs six and seven of the regulations of June 6, 1905, *supra*, are reaffirmed or restored with the following modification as to paragraph 6:

"Sixth. An entry embracing lands included within a withdrawal, made under either of the forms mentioned, whether such entry was made before or after the date of such withdrawals, may be contested and cancelled because of entryman's failure to comply with the law, or for any other sufficient reason, and any contestant who secures the cancellation of such entry and pays the land office fees occasioned by his contest, will be awarded a preferred right of making entry. Should the land embraced in the contested entry be within a first-form withdrawal at time of successful termination of the

contest, the preferred right may prove futile, for it cannot be exercised as long as ths land remains so withdrawn. Should it be within a second-form withdrawal, however, he (the contestant), may make entry under the terms of the reclamation act, and should it at that time, be excluded from all forms of withdrawal, he may enter as in other cases made and provided. It should be the duty however of such contestant to keep the local officers advised respecting his residence, to which notice may be sent him of his preference right of entry in event of successful contest, and a notice mailed to his address, shown by the records of the local land offiee at the time of the mailing of the notice of preference right, will be held to meet the requirement of the act of May 14, 1880. (21 Stat., 140.)"

"I understand that the cause assigned for denying the right of contest in the regulation of 1909 was the fact that, to a great degree, the contestant although successful in his contest, was unable to realize thereon because of the need of the lands for governmental use; and, further, that in instances where the lands were not desired for governmental use, their restoration, occurring at a date so far distant from the successful termination of the contest, led to confusion because of overlooking the outstanding preference right at the time of the opening of the land to entry, and at the time of entry of the lands by another.

"With respect to the lands that are desired for governmental use, the contestant brings his contest with the knowledge that it may prove futile because of that

contingency, and while there is, of course, danger of overlooking any postponed right, it seems to me that by appropriate notation upon the records, particularly the the plats of the local land office where the land is disposed of, certainly when other application is filed therefor, and if appropriate notice has not already been issued to the contestant, it should then be given, and no other disposition made of the lands pending the period of preference right accorded by the statute.

"Your future actions respecting contests will be governed accordingly. So instruct the local officers.

Very respectfully,

SAMUEL ADAMS,
First Assist. Secretary."

It is rather a remarkable coincidence that this circular, issued in August, 1912, completely reversing the former rules relating to the subject of contests on lands embraced within first-form reclamation withdrawals, and purporting to allow such contests, although the preference right gained thereunder might be "futile," was promulgated just after the Culpepper and Edwards applications for homestead entries had been canceled, and the preference rights, so called, of Ochelfree and Bodkin, allowed by the local land office officials at Los Angeles, to-wit: on June 1, 1912, and after the lands embraced in the two applications and contests, had been restored to public entry.

While this rule, being *ex-post facto*, cannot legally affect the status of the contests of, and the preference rights awarded to Ocheltree in 1908, and Bodkin in

1909, yet it does prove, especially by the explanation of the First Assistant Secretary, accompanying it, that, theretofore, contests of entries on lands embraced within a first form reclamation withdrawal, were not effective to create a valid preference right under the law and the rules of the department. And yet the department did allow the Ocheltree and Bodkin contests to be initiated, carried on and completed to the awarding of a so-called preference right while the lands embraced within the contested entries were withdrawn under the first form reclamation withdrawal. Thus we behold the anomalous situation of the department saying a thing cannot be done and at the same time doing it.

It also will be noticed that the First Assistant Secretary in issuing this circular, by which he revokes paragraphs 6 and 7 of the regulations of January 19, 1909, and restores sections 6 and 7 of the regulations of June 6, 1905, with his "modification" of Section 6, does not mention the regulations on the identical subject of May 31, 1910, nor of October 19, 1910, nor of April 29, 1912. The last mentioned being hardly dry from the press. And it will be observed also, that while this circular of August 24, 1912, allows contests of entries on lands embraced within a first form withdrawal, yet nowhere therein is there any regulation requiring the subsequent recognition of the "preference right" to be awarded to the successful contestant over first form withdrawal lands, but on the contrary the regulation admits that the "preferred right may prove futile," if the land embraced in the contested entry be within a

first form withdrawal at the time of successful termination of the contest.

Apparently not satisfied with his efforts of August 24th, 1912, the same First Assistant Secretary, some ten days later again essayed to make the regulations fit his ideas of such contests and produced the Circular of September 4, 1912.

7. Circular of September 4, 1912, Relating to Contests of Land Withdrawn Under Reclamation Act.

(41 L. D., 241.)

"The Commissioner of the General Land Office.

"Sir: Referring to Departmental decision of August 24, 1912, (41 L. D., 171,) re-affirming or restoring with modifications, paragraph 6 and 7, of the regulations of June 6, 1905, (33 L. D., 607,) with respect to contests concerning lands withdrawn under the reclamation act of June 17, 1902, (32 Stat., 388,) said sections are hereby amended to read as follows:

"Sixth. An entry embracing lands including within a withdrawal made under either of the forms mentioned, whether such entry was made before or after the date of such withdrawal, may be contested and canceled because of entryman's failure to comply with the law, or for any other sufficient reason, and any contestant who secures the cancellation of such entry and pays the land office fees occasioned by his contest, will be awarded a preferred right of making entry. Should the land embraced in the contested entry be within a first form withdrawal at time of successful termination of the contest,

the preferred right may prove futile, for it cannot be exercised as long as the land remains so withdrawn. Should it be within a second form withdrawal, however, he (the contestant) may make entry under the terms of the Reclamation Act, and should it, at that time, be excluded from all forms of withdrawal, he may enter as in other cases made and provided. [No contest can be allowed, however, against any qualified entryman who, prior to June 25, 1910, made *bona fide* entry upon lands proposed to be irrigated and who established residence in good faith upon the lands entered by him, for failure to maintain residence or to make improvements upon his land prior to the time when water is available for its irrigation. Successful contestants against entries in second forms withdrawals, reclamation projects, cannot be allowed to exercise preference right of entry prior to the time when the Secretary shall have established the unit of acreage, fixed the water charges and the date when water can be applied and made public announcement of the same.] It should be the duty, however, of such contestants to keep the local officers advised respecting his residence, to which notice may be sent him of his preference right of entry in event of successful contest, and a notice mailed to his address, shown by the records of the local land office at the time of the mailing of the notice of preference right, will be held to meet the requirements of the act of May 14, 1880, (21 Stat., 140.)

"Seventh. When any entry for lands embraced within a withdrawal under the first form or under the

second form, Section 5, of the Act of June 25, 1910, (36 Stat., 835,) is canceled by reason of contest or for any other reason, such lands become subject immediately to such withdrawal and cannot thereafter, so long as they remain so withdrawn, be entered or otherwise appropriated, either by successful contestant or any other person, but any contestant who gains a preferred right to enter any such lands may exercise that right at any time within thirty days from notice that the lands involved have been released from such withdrawal and made subject to entry."

"Department decision of Aug. 24th, 1912, is modified and your future action respecting contests will be governed accordingly. So advise the local land officers.

Very respectfully,

SAMUEL ADAMS,

First Assistant Secretary."

Herein we find Section 6, the same as promulgated August 24, 1912, with the addition therein, however, of that part which we have enclosed in brackets. But herein we also find that Section 7 has been so amended as to prolong the life of the preference right to be awarded to the successful contestant of entries embraced within first form reclamation withdrawals to "thirty days from notice that the lands involved have been released from such withdrawal and made subject to entry."

That is exactly what the Department had done in fact only three months before, when it allowed the preference rights of Ocheltree and Bodkin, theretofore granted them, to overcome the settler's rights of Cul-

pepper and Edwards, respectively. Hence we claim that the Department has not only gone contrary to the law, but contrary to its own regulations in these two cases, and thereafter in the interests of harmony made two efforts to draft a regulation to fit its decision.

8. Circular of February 6, 1913, Containing Laws and Regulations Relating to the Reclamation of Arid Lands.

(42 L. D., 35-37.)

"25. An entry embracing land included within a first or second form reclamation withdrawal, whether such entry was made before or after the date of such withdrawal, may be contested and canceled because of entryman's failure to comply with the law or for any other sufficient reason, and any contestant who secures the cancellation of such entry and pays the land office fees occasioned by his contest will be awarded a preferred right of making entry. Should the land embraced in the contested entry be within a first form withdrawal at time of successful termination of the contest the preferred right may prove futile, for it cannot be exercised as long as the land remains so withdrawn. Should it be within a second form withdrawal, however, the contestant may make entry under the terms of the reclamation law, and should it at that time be released from all forms of withdrawal, he may enter as in other cases made and provided. No contest can be allowed, however, against any qualified entryman who, prior to June 25, 1910, made *bona fide* entry upon lands proposed

to be irrigated and who established residence in good faith upon the lands entered by him, for failure to maintain residence or to make improvements upon his land prior to the time when water is available for its irrigation. Successful contestants against entries in second form reclamation withdrawals cannot be allowed to exercise preference right of entry prior to the time when the Secretary shall have established the unit of acreage, fixed the water charges, and the date when water can be applied and made public announcement of the same. It should be the duty, however, of such contestant to keep the local officers advised respecting his residence to which notice may be sent him of his preference right of entry in event of successful contest, and a notice mailed to his address, shown by the records of the local land office at the time of the mailing of the notice of preference right, will be held to meet the requirements of the Act of May 14, 1880, (21 Stat., 140.)

"26. When any entry for lands embraced within a first or second form reclamation withdrawal is canceled for any reason, such lands become subject immediately to such withdrawal. Such lands under first form withdrawal cannot therefore, so long as they remain so withdrawn, be entered or otherwise appropriated either by a successful contestant or any other person; but any contestant who gains a preference right to enter any such first form withdrawal lands may exercise that right at any time within thirty days from the notice that the lands involved have been restored to the public domain or the withdrawal changed to sec-

ond form. Such lands withdrawn under second form withdrawal may be entered under the reclamation act when subject to entry by reason of public notice having been issued as in these regulations provided, and a contestant in such case will be allowed thirty days preference right to make entry."

The above sections 25 and 26 of this circular are almost identical with sections six and seven of the previous circular of September 4, 1912,the only difference being the language used in the opening sentence of each section, and it re-announces the new doctrine of the "floating" preference right.

Having reviewed at length all the regulations and instructions of the executive department having charge of the public lands of ihe United States, it now remains our duty to find from its decisions, how it has been construing the statute creating this preference right, and what has been its action concerning contests of entries on first form withdrawal lands, prior and up to the action of June 1, 1910, on the Ocheltree and Bodkin preference rights applications. As we have already cited and quoted from many cases touching the subject of contests and preference rights in general, we now devote ourselves to citing and quoting only from cases involving reclamation withdrawals, and the relation of preference rights thereto.

In the case of John J. Maney, 35 L. D., 250, the Secretary decided:

"Indeed, even a valid homestead entry for land within the limits of a withdrawal for irrigation works,

under the authority of the act of June 17, 1902, existing at the date of such withdrawal, upon which entry final certificate had not issued, or the legal or equitable title to the land embraced therein become vested, may be canceled by the department if it appears that such land is required for use in the construction and maintenance of such work. (Instructions June 5, 1905, 33 L. D., 607. Instructions October 12, 1905, 34 L. D., 158. Opinion January 25, 1906, *Id.* 421. Opinion February 20, 1906, *Id.*, 445), for, as was stated in instructions of January 13, 1904 (32 L. D., 387), such withdrawals have the force of legislative withdrawals, and are therefore effective to withdraw all lands within designated limits to which right has not vested."

One of the best considered cases decided by the department involving this subject, comes shortly after the passage of the reclamation act, to-wit: on January 14, 1904, and from it we quote rather freely. It it the case of Emma H. Pike, 32 L. D., 395:

"It is well settled that an executive order creating a reservation for a public purpose, and embracing land covered by a *prima facie* valid entry, will take effect thereon if the entry is subsequently canceled. Charles W. Filkins (5 L. D., 49); Staltz vs. White Spirit et al. (10 L. D., 144); James M. Gilman (15 L. D., 2); and Hostrawser vs. McSwain (18 L. D., 523). In the latter case it was held (syllabus):

" 'A contestant who successfully attacks an entry covering a tract of land embraced within the limits of a withdrawal for a public reservation made after said

entry was allowed, does not thereby secure a right that will exclude said tract from the operation of the order creating the reservation.' "

The Secretary then proceeds to cite and quote from the case of Jefferson E. Davis (19 L. D., 489), and from the case of William H. Schmith (30 L. D., 6), hereinbefore quoted by us, and then proceeds:

"In respect to the force or character of the right secured by Emma H. Pike under the act of May 14, 1880 (21 Stat. 140), by reason of her contest against the Yarten entry, certain language used in the case of Strader vs. Goodhue (31 L. D., 137) is referred to and relied upon in her appeal here. That language is as follows:

" 'The preference right is not a vested right until a contestant has "contested, paid the land office fees, and procured the concellation" of the entry attacked.'

"But the facts in that case alone negative the suggestion that it was intended to hold, as a proper construction of the act of May 14, 1880, that even when a contestant has performed all the prerequisites imposed by said act he thereby secures *vested* right. Such a construction would of course imply that the right is of such force and character that it could not be divested even by an Act of Congress, authorizing the withdrawal of the land involved for some contemplated public purpose. The reverse of this proposition appears in numerous decisions both of the department, some of which are cited herein, and of the Supreme Court. * * * * * * *

"That the purpose of section 2 of the act of May 14, 1880, *supra*, was solely to award to the contestant a preferred right for thirty days to enter the land *as against every one except* the United States, is well established."

After quoting the language of the section, the decision continues:

"In no manner can this language be fairly construed as conferring a vested right upon a successful contestant. The act only confers a privilege on him to enter the land in preference to others. *As to other claimants he has a superior right for a limited period to enter the land.* (Italics ours.) But it is a right that may be waived by the contestant; it does not extend to one who is disqualified from entering the land; *only after its exercise does it become effective to exclude adverse claims.* (Italics ours.) And even then the contestant must fulfill the requirements of the law under which he makes entry, before procuring title. It is not a right that *reserves* the land from other disposal. In the language of the circular of July 4, 1899. (29 L. D., 29:

"Thereafter, and until the period accorded a successful contestant has expired or he has waived his preferred right, applications may be received, entered, and held subject to the rights of the contestant, the same to be disposed of in the order of filing upon the expiration of the period accorded the successful contestant or upon the filing of his waiver of preferred right."

"The Act authorizing the withdrawal and the order carrying the same into effect, covering the township in

which the land here in question is situated, *were both made prior to the cancellation of the entry contested by Emma H. Pike. Under the rulings, whatever preferred right she may have had, the same not amounting to a vested right, was defeated by the intervening order of withdrawal which took effect immediately upon the cancellation of the contested entry.*" (Italics ours.)

The next case of interest is that of Ernest Woodcock, 38 L. D., 349, decided Dec. 14, 1909.

"Ernest Woodcock has appealed from your decision of July 15, 1909, in which affirming the action of the Register and Receiver at North Yakima, Washington, you rejected Woodcock's application 02586 to make homestead entry for the N. W. ¼ N. W. ¼ Sec. 28, T. 13, N. R. 17 E., for the reason that the land is included within a first form withdrawal under the Act of June 17, 1902, (32 Stat., 388;) the withdrawal having been made by order of the Secretary of the Interior, dated October 9, 1905. It is urged in the brief and argument of appellant accompanying his appeal, that error was committed in holding that the land was withdrawn from all forms of entry under the Reclamation Act, for the alleged reason that no irrigation works are to be constructed thereon and the withdrawal for any other purpose is not warranted by the law. It is further contended that the application should have been received and held suspended until a contestant, who secured a cancellation of a homestead entry formerly embracing this land, had an opportunity to exercise his preference right upon one of the farm units, which it is

assumed will be created from the lands withdrawn and thereafter upon the restoration of the lands to entry, appellants application to enter should be allowed.

"The act of June 17, 1902, authorizes the Secretary of the Interior to withdraw 'from public entry the lands required for any irrigation works contemplated under the provisions of this Act.' Such withdrawals are legislative in their effect and preclude the allowance of any application or filing therefor under the public land laws. The motives or purposes of the officers making the withdrawal cannot be attacked by appellant, for, as held in the case of Riverside Oil Company vs. Hitchcock, (190 U. S., 316,) 'Neither an injunction or mandamus will lie against an officer of the Land Department to control him in discharging an official duty which requires the exercise of his judgment and discretion.' In the case of Wolsey vs. Chapman, (101 U. S., 755,) the court held that a withdrawal by the proper executive of the government was sufficient to defeat a settlement for the purpose of pre-emption while the order was in force, 'notwithstanding it was afterwards found that the law by reason of which the action was taken did not contemplate such a withdrawal.'

"Whether this particular tract of land is or will be required or used in the construction of irrigation works is a question to be determined by the Secretary of the Interior, and until he has reached a determination of that question, the Act of June 17, 1902, authorizes him to withhold the land from appropriation and disposition. It is a general rule well supported by both law and good

administration that no rights are obtained by an attempt to settle or file upon lands at the time embraced in a reservation or withdrawal made by or under proper authority.

"Your decision in rejecting the homestead application to enter is accordingly hereby affirmed."

A review of the decisions of the Land Department on the subject of preference rights accruing from successful contests, would not be complete without considering the case of Fairchild vs. Eby, 37 L. D., 362, decided December 28, 1908, as this decision created the rules announced in the Circular of January 19, 1909, relatiug to contests of entries on withdrawn lands.

The facts of that case are briefly these:

On August 19, 1907, Eby filed a contest against a desert land entry of one Spangler, while the lands embraced in the entry were withdrawn under the first form reclamation withdrawal by order of May 6, 1904. The contest was entertained by the local land office and on January 14, 1908, Eby was notified, (erroneously so the Department says in the opinion,) of the cancellation of the entry, ~~said~~ and that he had thirty days preference right within which to file on the land. On February 9, 1908, Eby appeared for the purpose of making entry and was informed that by reason of withdrawal on May 6, 1904, the land was not available for entry. On March 2, 1908, the lands involved were restored to entry under the second form. On March 30th, 1908, Fairchild filed application to enter. On April, 13, 1908, Eby again applied to enter the land in question, but was informed

that the same had been entered by Fairchild. On April 14, 1908, the local officers by letter, notified Fairchild that his entry was improperly allowed, as a preference right to said land was outstanding in favor of Eby. On June 13, 1908, the Commissioner affirmed the action of the local officers, and appeal was taken to the Secretary, who then proceeds in his decision as follows:

"The case is now before this Department on appeal, filed by Sherman D. Fairchild, which contends that the contest should not have been entertained in the first instance because said land is within a government reserve and that even if a preference right ever existed in favor of Daniel A. Eby by reason of his contest, it was for thirty days next after notice to him after the cancellation of Spangler's entry.

"The contention of Fairchild that the contest should not have been allowed would be tenable but for the regulations of the department of June 6, 1905 (33 L. D., 607), the sixth section of which expressly provides for the allowance of contests against any entry covered by a withdrawal for reclamation purposes, whether the withdrawal is of lands for use in the construction and operation of reclamation works, or of lands susceptible to irrigation from such works.

"When a contest is filed under said rule against an entry which is covered by a withdrawal for use by the government, the seventh section of said regulations provides that the land cannot be appropriated by a successful contestant so long as the lands remain withdrawn; "but any contestant who gains a preferred right to enter

such lands may exercise that right at any time within thirty days from notice that the lands involved have been released from such withdrawal and made subject to entry."

"*It was thus contemplated that the preference right allowed by the sixth section should remain suspended* if the land was not subject to entry at the date of cancellation, but that the preference right so acquired might be exercised whenever the land was restored. Whether a contest challenging the validity of any entry should or should not be allowed is a matter resting within executive jurisdiction, but when it has been allowed, and in pursuance thereof the entry has been canceled as the result of such contest, *the right of the successful contestant to a preference right of entry of such land whenever it is restored to entry is a legal right given by the statute and cannot be controlled by executive discretion.*

"*It follows that after the land has become subject to entry, Eby was entitled to the usual notice provided by the statute of the preference right to make entry of the land within the statutory period.* As such notice was not given, the entry of Fairchild was improperly allowed and must be canceled.

"But for the express provision in section 6 of said regulation Eby could not have acquired a preference right of entry, for the reason that at the date of the filing of his contest the lands had been appropriated by the government for contemplated use in the construction and operation of irrigation works, and every one, in

the absence of such rule, would be put upon notice that he could not acquire a right to enter the land upon the cancellation of the entry.

"*A regulation that contemplates the acquisition of legal rights that must be suspended indefinitely can only result in great confusion* in the disposal of the public lands and ought not to have been made and should not be continued. Such is the apparent result of the right conferred by the sixth and seventh regulations of June 6, 1905, and it is believed that the interest of the government, as well as the general public, will be subserved by their revocation. In the future no contest will be allowed against any entry of land that has been appropriated by the government, and in all cases when a contest has been allowed before such appropriation, *the withdrawal of the land* for use by the government *before* the termination of the contest, *or an entry by the successful contestant, will ipso facto terminate all right that was acquired by reason of such contest.* (Italics ours.)

"A contest should be allowed against any entry of lands susceptible of irrigation from any government works, either before or after the withdrawal of such lands, but if the lands shall have been withdrawn before the successful contestant enters, his entry will be subject to the limitations and conditions of the reclamation act.

"It is therefore directed that sections six and seven of of the regulations of June 6, 1905, be amended accordingly.

"Your decision is affirmed."

We respectfully suggest that the above decision is essentially wrong, and on its face shows wherein the Secretary misapplied and misconstrued the two sections referred to. Section six of the regulations is relied upon by the Secretary as the creator of the preference right claimed by Eby, and yet the same section expressly declares that a preference right *shall not* be awarded to the successful contestant *if the lands involved are embraced within a first form withdrawal.*

Furthermore we contend that the Interior Department has no power of control over the statutory preference right, so as to suspend it during departmental discretion. Such is the action of the department in this case, and such was its action in the cases at bar. A careful consideration of the foregoing decision will demonstrate that the ruling therein was not only contrary to law, as we herein contend, but was in fact directly contrary to the regulation upon which the decision is based for its authority.

Besides, under the new regulations adopted by this decision both the Ocheltree and Bodkin preference rights would be declared terminated by the withdrawal, *as neither made entry thereunder prior to the withdrawal.* One might appropriately say that the so called preference rights of Ocheltree and Bodkin under the circumstances and the then rules, as well as the law, as we contend the law is, were "still born," rather than being born alive, and preserved until restoration of the lands by the incubation process of "suspension" adopted by the land department.

We now come to a consideration of the decision of the land department in the case of Beach vs. Hansen (40 L. D., 607), rendered April 3, 1912, just two months prior to the rejection of the Culpepper and Edwards homestead applications based on settlers' preference rights, and the allowance of the applications of Ocheltree and Bodkin, based on the preference rights theretofore awarded them, and undoubtedly this decision was controlling in the action of the local land land officers on that occasion. It is as follows:

"Harry E. Beach appealed from decision of the Commissioner of the General Land Office of June 29, 1911, rejecting his application for homestead entry for S. E. ¼ Sec. 4, T. 8 N., R. 29 E., W. M., Walla Walla, Washington.

"February 23, 1902, Fred A. Hall made homestead entry for this land against which George E. Hanson filed contest, which effected its cancellation January 22, 1908.

"December 29, 1905, the land was withdrawn for use in Yakima project, and was restored August 18, 1910, to settlement November 8, and to entry December 8, 1910, on which day Beach filed homestead application, alleging settlement, November 8, 1910.

December 12, 1910, Hanson was allowed to make desert land entry in exercise of his preference right as successful contestant and Beach's homestead application was that day rejected for conflict therewith. The commissioner affirmed that action.

It is assigned as error of the decision that paragraph

6, instructions of January 19, 1909, (37 L. D., 365,) and of October 15, 1910, (36 L. D., 296,) and Act of June 25, 1910, (36 Stat., 835,) absolutely terminated any preference right of Hanson.

"It is true that Hanson got no right as against the United States to enter the land embraced in Hall's entry, then withdrawn for use in Yakima project. This is because the paramount *supposed* interest of the United States will not permit another entry. *But if it be found that no interest of the United States requires appropriation of the land to public use, and that the withdrawal was made under misapprehension of fact, the preference right attaches, for that is statutory, granted by act of May 14, 1880, (21 Stat., 140.)* (Italics ours.) The land department has no authority by regulation to disregard the act or deny the right. Regulations apply to land under *proper* withdrawals for public use and for protection of public interest. Thus in Wright vs. Francis et al., 26 L. D., 499, the Department held that when exercise of a contestant's preference right was prevented by withdrawal of the land for reclamation before expiration of the preference period, and it was restored to entry, the right may be exercised within thirty days after such restoration. The present case like that in Wright vs. Francis, involves land withdrawn pending contest. The two cases differ in no material respect. * * * The decision is affirmed."

Inasmuch as the foregoing decision seems to be based on that in Wright vs. Francis, as its guide and authority, let us examine that case.

Wright vs. Francis et al., (36 L. D., 499.)
Decided June 6, 1908.

Briefly stated the facts in this case, as pertinent hereto, are as follows:

On July 30, 1903, Wright instituted contest against homestead entry of one Armstrong.

On April 24, 1905, the Armstrong entry was canceled and Wright given a preference right to enter the tract embraced in the Armstrong entry.

On May 27, and June 3, 1905, Wright in the exercise of his preference right, filed separate applications for each governmental subdivision to enter the land in controversy.

On June 13, 1904, while the contest was pending and undetermined, the Department withdrew this land from entry, filing or selection *under the second form of the Reclamation Act of June 17, 1902.*

On March 8, 1905, the Department released the land from such withdrawal restoring same to settlemeut on that date, and to entry June 20, 1905.

On April 24, 1905, Francis filed application to enter the land as a homestead, this being the same day that the Armstrong entry was canceled and the preference right awarded to Wright. The Francis application was held in obeyance pending the exercise of the preference right awarded Wright, but was thereafter rejected because presented at a time when the land was not subject to entry.

On June 3, 1905, the local officers rejected Wright's application, for the reason that the lands embraced

therein were withdrawn, from which appeal was taken to the Commissioner.

The decision then proceeds as follows:

"You hold that Wright in view of the withdrawal and restoration to entry of the land in controversy, made valid use of his preference right and sustain his application. * * * * * * * *

"In view of the reasons underlying section 7 of the Circular of June 6, 1905, (33 L. D., 607,) and the fact that no valid application to make homestead entry for this tract was then pending, it is held that the time within which Wright could use his preference right did not expire until thirty days after June 20, 1905, the date upon which said land was subject to entry, and that his application was submitted in time for consideration. This is clearly in accord with departmental action in the unreported case of Edwin P. Marshall, assignee, of date September 12, 1907, and under the circumstances shown by the record, the unreported case of Hufford vs. Waugh, of June 26, 1906, will not be followed.

"It is noticed that Wright's application was filed before the date fixed upon which this land was to become subject to entry, *but the time allowed him to use his preference right as then understood was about to expire, no ruling having been made allowing such right to be exercised thirty days after the date of restoration of the lands to entry.* (Italics ours.) Under the circumstances his application will be considered as made in due and proper time."

In the decision in Beach vs. Hansen, the Secretary says that that case differs in no material respect from the Wright vs. Francis case. We very respectfully suggest that the two cases are entirely and fundamentally dissimilar, in that the Beach vs. Hansen case involves a *first form wilhdrawal*, and the Wright vs. Francis case a *second form withdrawal*. And while the former case deals with Section 6 of the Circular of 1905, the latter case deals with Section 7 thereof. And while Section 6 of the Circular of 1905, denies a preference right to the successful contestant of an entry on *first form withdrawal* lands, such as were involved in the Beach vs. Hansen case, Section 7 of that Circular which was in force in 1908 at the time of the decision in Wright vs. Francis, *expressly confers on the successful contestant of an entry on second form withdrawal lands*, *the right* at any time within thirty days from notice that the lands involved have been released from withdrawal and made subject to entry, to exercise the preference right authorized by the act of May 14, 1880, and expressly recognized by Section 6 of that Circular.

Beside at that time a second form withdrawal did not operate to prevent homestead entries on the withdrawn lands, for Section 4 of the Reclamation Act provides that: "The Secretary of the Interior is hereby authorized at or immediately prior to the time of beginning surveys for any contemplated irrigation works, *to withdraw from entry*, *except under the homestead laws*, *any public lands believed to be susceptible of irrigation from said works;* provided, that all lands entered and entries

made under the homestead laws within areas so withdrawn during such withdrawals shall be subject to all the provisions, limitations, charges, terms, and conditions of this Act.'' (32 Stat., 388.)

This right of homestead entry on second form withdrawn lands existed at the time of the Wright vs. Francis decision, and until June 25, 1910, when section 5 of the act of that date was enacted, providing that no entry shall be made on second form withdrawn lands, ''until the Secretary of the Interior shall have established the unit of acreage, fixed the water charges and the date when the water can be applied and made public announcement of the same.'' (35 Stats,, 835.)

In the Wright vs. Francis case, the contest was initiated before withdrawal, which was of the *second form*, was continued and allowed, the entry cancelled and a preference right awarded, while the land was withdrawn from entry under *second form withdrawal.* Within thirty days from notice of snch preference right, Wright filed application to enter under his preference right, but at the time the lands were not yet restored to *general* entry, although they were open to *homestead* entry under the reclamation act, the full restoration taking place a few days later, to-wit: on June 20, 1905.

Under these facts the Secretary decided the Wright application to exercise his preference right was filed in time.

This is entirely different from the facts in the Beach vs. Hansen case, and instead of supporting the conclusion arrived at in that decision, the Wright vs. Francis

decision demonstrated that the Beach vs. Hansen case was wrongly decided, and does not find support in the former decision at all. As a matter of plain fact demonstrated by the language of the decision in Beach vs. Hansen, the conclusion therein reached and the recognition of the so called preference right of Hansen *was arbitrarily made and given on the assumption by the land department that the withdrawal of the land involved under the first form for use in the Yakima Project was made under misapprehension of fact.*

And having made this arbitrary assumption, the department proceeds to arbitrarily declare that, such being the case, the preference right, awarded during such withdrawal, attaches and cannot be disregarded by the department. And this action of the department was done directly contrary to section 6 of its own regulations of 1909.

In another decision (rendered August 29, 1913), of the department in the case of Chas. E. Wells vs. Florence V. Bodkin, the former being father of two of the defendants herein, and the latter being daughter of Patrick H. Bodkin described in the indictment herein, the true character and limitations of the statutory preference right is recognized.

Wells had settled and filed on a quarter section in the same neighborhood as plaintiffs in error herein, and on the same days. Florence V. Bodkin had theretofore contested to successful termination a former entry on the same land, and had been awarded a preference right, which she sought to exercise by filing her declar-

ation of homestead, based thereon, on May 18, 1910. But prior to June 1, 1912, when the local land office acted on these two applications, Florence V. Bodkin died.

The Secretary in deciding that the heirs, if qualified, may succeed to such preference right on death of the successful contestant, used this language:

"He is given by the act of May 14, 1880, if a qualified person, a right of entry as to the lands involved, as a reward for initiating contest and prosecuting same to a cancellation of the contested entry, and he must be assumed to have in contemplation when he initiated his contest, as he is required by the present rules of practice to have, the ultimate making of an entry based on such contest as its fruition and end. His contest carries with it therefore, an *incipient and inchoate statutory right of entry, and is in legal effect subsisting as between him and the United States, as the basis for such right of entry, until said right is exercised, waived or lost by some act of his, or is foreclosed by some interest of the government or by limitation of the law.*" (42 L. D., 340.)

After reading the Beach vs. Hansen decision, which, as said before, was rendered April 3, 1912, we can understand the attitude of the land department towards the Culpepper and Edwards entries, as opposed by the Ocheltree and Bodkin preference rights, respectively, when, on June 1, 1912, the former were canceled and the latter allowed by the local land officers. And the reasons for so doing appear in a decision of the depart-

ment in the case of Edwards vs. Bodkin, decided May 27, 1913, wherein the department seeks to justify such action in the following opinion:

Edwards vs. Bodkin (42 L. D,, 172.)

"William B. Edwards has appealed from the decision of the Commissioner of the General Land Office, dated November 21, 1912, rejecting his homestead application for the N. E. ¼ Sec. 11, T. 7 S., R. 22 E., S. B. M., Los Angeles, California, land district, under the act of February 8, 1908 (35 Stat., 6).

"The material facts in the case, as disclosed by the record are as follows:"

Then follows a statement of the facts as herein shown by the bill of exceptions, and after quoting section six of the regulations of January 12, 1909, the decision continues as follows:

"The preference right of entry conferred by the act of May 14, 1880, *supra*, upon any person who 'has contested, paid the land office fees, and procured the cancellation' of a homestead entry is a *statutory right which the land department is without authority to deny or disregard by regulations or otherwise. See Beach vs. Hansen (40 L. D., 607.)* (Italics ours.)

"The regulations of January 19, 1909, *supra*, were intended to apply to lands under *proper withdrawals for public use* and for the protection of public interests. *But where, as in this case, it is found that a withdrawal was made under a misapprehension of fact, said regulations could have no further effect than to postpone*

the exercise of the preference right until the lands were restored to public entry." (Italics ours.)

* * * * * * *

"The Department has given careful consideration to the claims on behalf of Edwards, that he has made *bona fide* settlement on the land and has largely reclaimed the same from its desert state. As has been stated, this Department is without authority, as well as without disposition, to disregard the preference right of entry, duly earned by Bodkin under the law."

The foregoing quotations comprise all the reasons advanced by the Department for its action in recognizing Bodkin's contest and his preference right awarded by the Commissioner June 25, 1909 (and afterwards, for some inexplicable reason), again awarded by the Secretary of the Interior on April 19, 1910, (Tr., p. 84)), as against the Edwards settlement of April 18, 1910, and homestead entry of May 18, 1910, and the reasons are all embraced within the one sentence therein namely: "But where, as in this case, it is found that a withdrawal was made under a misapprehension of fact, said regulations could have no further effect than to postpone the exercise of the preference right until the lands were restored to public entry;" an excuse or reason which we claim is purely arbitrary, and based upon a purely arbitrary assumption.

And this Honorble Court will recall also that this identical reason was given for the decision in the Beach vs. Hansen case, *supra*, on the same arbitrary assumption as to the Yakima Project. In short the Depart-

ment arbitrarily assumes that although lands have been duly and legally withdrawn from all forms of public entry under the reclamation act (that is under the first form), if they are afterwards restored to public entry, it must necessarily follow that the withdrawal was made "under a misapprehension of fact," and that all the law and all the rules and regulations governing such withdrawn lands become ineffectual and inapplicable as to preference rights awarded during such withdrawals.

That such a theory is arbitrary and untenable is demonstrated by the whole theory of the reclamation act itself, especially by its terms conferring power of withdrawal on the Secretary of the Interior. Section 3 of that act provides: (32 Stat., 388).

"That the Secretary of the Interior shall, before giving the public notice provided for in section 4 of this act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this act, *and shall restore to public entry any of the lands so withdrawn* when, in his judgment, such lands are not required for the purposes of this act." (Italics ours.) And section 4 of the act provides: "That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts, etc."

The Department itself has always recognized the uncertainty of these reclamation withdrawals, and in that regard clearly expressed itself in its circular of February 6, 1913 (42 L. D., 349), wherein it is said:

"10. The withdrawals of the lands at first is prin-

cipally for the purpose of making surveys and irrigation investigations in order to determine the feasibility of the plans of irrigation and reclamation proposed. Only a portion of the lands will be irrigated even if the project is feasible, but it will be impossible to decide in advance of careful examination what lands may be watered, if any, and the mere fact that surveys are in progress is no indication whatever that the works will be built. It cannot be determined how much water there may be available, or what lands can be covered, or whether the cost will be too great to justify the undertaking until the surveys and the irrigation investigations have been completed."

As the decision of this case of Edwards vs. Bodkin is based upon the authority of the Beach vs. Hansen case, it is proper for us to again remind this court that the latter case was decided upan the same theory of a "misapprehension" as advanced herein, and also on the authority of the case of Wright vs. Francis, which we demonstrated did not support the theory but rather proved its falsity. And we might add that if the Department, when writing the opinion in the Edwards case, had added the words "or extend beyond the statutory limit of thirty days after notice," to the sentence "The preference right of entry * * * * * is a statutory right which the land department is without authority to deny or disregard," it would have correctly defined the right, and therefore would have been obliged to disregard the Bodkin preference right application.

As to the theory of the withdrawal herein having

been made under a "misapprehension of fact," (a theory which apparently emanates solely from the secret mind of the Department,) the conclusion of the Department, drawn thereon in these decisions is negatived and destroyed by the decision of the Supreme Court of the United States in Wolsey vs. Chapman (101 U. S., 755,) wherein it is held *that a withdrawal by the proper executive of* the government *was sufficient to defeat a settlement* for the purpose of pre-emption *while the order was in force*, "*notwithstanding it was afterwards found that the law by reason of which this action was taken did not contemplate such a withdrawal.*" (Italics ours.) The Department itself has cited and quoted the above decision in the case of Woodcock (38 L. D., 349,) wherein it was expressly held that the motives or purposes of the officer making a withdrawal could not be attacked and that whether or not a particular tract of land is or will be required or used in the construction of irrigation works is a question to be determined by the Secretary, and until he reaches a determination of that question, the Reclamation Act authorizes him to withhold the lands from appropriation and disposition.

Furthermore the sanctity given to the preference rights awarded in the Beach vs. Hansen case, and to Ocheltree and Bodkin herein, is not recognized by the Department in its decision of January 29, 1912, in the case of Henry A. Schroeder (40 L. D., 458,) wherein it is decided:

"It has been held by the Department that the right given under the Statute (Act of May 14, 1880,) is in the

nature of a reward to an informer, but it cannot be construed to give him any pecuniary right as contended for in this appeal. The entryman in this case is *entitled to a period of thirty days from notice of cancellation of said entry within which to apply to enter the land.*" (Italics ours.)

We must beg the indulgence of this honorable court for the prolixity of the foregoing review of the instructions, regulations and decisions of the Land Department, but it seemed necessary, owing not only to the importance of learning the construction placed by that executive department upon the statute creating this preference right, but because there have been no decisions of law courts upon the precise question herein. And indeed we have been able to find but two court decisions which apparently are similar or analogous to the case at bar, and those we now present to the court.

Riley vs. Welles, (76 U. S., 19 L. Ed., 648.

The Supreme Court of the United States in Riley vs. Welles, has rendered a decision which we think is analogous to the case at bar, and supports our contention that the act of the local land officials of June 1, 1912, was without jurisdiction and void. That decision is in part as follows:

"In the present case the defendant claims title under, and in pursuance of, the Pre-emption Act of September 4, 1841. Her husband took possession of the lot in 1855, and she was permitted by the register to prove up her possession and occupation, May, 1862. The patent was issued October 15, 1863. It will appear from the

case of Wolcott vs. The Des Moines Co. (*supra*) that the tract of land, of which the lot in question was a part, had been withdrawn from sale and entry on account of a difference of opinion among the officers of the Land Department as to the extent of the original grant, by Congress, of lands in aid of the improvement of the Des Moines river, from the year 1846 down to the resolution of Congress of March 2, 1861, and the Act of July 12, 1862, which acts we held, confirmed the title in the Des Moines Company. As the husband of the plaintiff entered upon the lot in 1855 without right, *the permission of the Register to prove up* the possession and improvements, *and to make the entry under the pre-emption laws*, *were acts in violation of law and void*, as was also the issuing of the patent." (Italics ours.)

Whitehill vs. Victorio Land and Cattle Co.

139 Pac. Rep., 184.

This cause decided February 11, 1914, by the Supreme Court of New Mexico, was an action wherein Mary Bell Whitehill, appellee therein, brought suit against the Victorio Land & Cattle Co., appellant, for damages for trespass by cattle upon certain lands claimed by appellee under a desert land entry. The testimony showed that on May 6, 1911, appellee filed her desert land entry declaration in the U. S. Land Office on certain lands, a portion of which, 40 acres in extent, had at the time been reserved by the government, for which reason this portion of the desert land entry was afterwards canceled, but not until after the trespass complained of was committed; the trespass com-

plained of having occured between July 20, and August 4, 1911, while the cancellation was made October 17, 1911.

After stating the facts, the court through Mr. Justice Hanna, said:

"The first error assigned and presented for the consideration of this court, is based upon a refusal of the District Court to instruct the jury that plaintiff could not recover for injuries to that portion of the lands covered by plaintiff's desert entry, which was subsequently canceled. * * * * * * * * *

It is contended by the appellant that, the subdivision of plaintiff's entry not being subject to entry, the receiving and allowing of entry by officers of the local land office was without authority, and therefore void. On the other hand, appellee contends that an entry of land valid on its face, constitutes such an appropriation and withdrawal of the land as to segregate it from the public domain and appropriate it to private use, and, even though the entry may be in fact invalid, no lawful entry or settlement can be made on the land by another person. With this contention we agree, and we find the principle supported by the following well considered authorities. (Cases cited.)

"We do not overlook appellant's contention that the rule referred to is applicable only to cases where the entries or filings are valid when made, or at least are only voidable by reason of facts not apparent upon the records; and that, in the case under present consideration, the same records by which were proved the making of the entry showed a portion of the land included therein had

been heretofore reserved, for which reason the land was not subject to entry, and as to that portion reserved, the entry was void.

* * * * *

"We are not to consider the question as one arising between the government and the entryman, but as affecting the status of the entry at the time of the alleged trespass by appellant. It would seem to turn upon the point of whether a portion of the entry was void or was voidable, by reason of the pre-existing reservation. It is apparent that the officials of the land office have, in the matter of the cancellation of that portion of the entry canceled, pursued a course which, it may be argued, recognized the entry as one of *prima facie* validity.

"The withdrawal of the land was a fact peculiarly within the knowledge of the officials of the land office. The fact that the officers of the land office were in error in overlooking an order of withdrawal of the land from entry would not, as a matter of first impression, make the entry void, but rather voidable, upon the question being raised by the party entited to raise it; *i. e.*, the government. The cases cited, *supra*, are those where latent defects exist; the entry being, so far as could be known at the time of making, *prima facie* valid but investigation subsequently developing that the entryman was disqualified to make the entry, or had perpetrated fraud, conditions to be discovered by evidence dehors the record, and being essentially questions or fact.

"It has long been settled that as to matters of fact,

within the scope of the authority of the officers of the land department of the United States, their findings must be taken as conclusive, in the absence of fraud and mistake, upon the principle of estoppel by former adjudication. (Cases cited.)

"If the reservation of the land in question from entry is a question of fact, to be determined by the land officials, then the District Court would be concluded by the finding of the officials, as evidenced by the acceptance of the entry, and no error could now be predicated upon the refusal of that court to instruct the jury that plaintiff could not recover for injuries to that portion of the land reserved from entry. If the reservation from entry, however, deprived the officials of all jurisdiction over the land, and left them devoid of authority to consider a filing upon the land reserved, then the acceptance of the entry would be without jurisdiction and absolutely void, all of which could be inquired into in an action at law.

"No cases in point have been cited, nor have we been able to find any, where the facts were analogous to those now before us. * * *But it is also equally true that when by Act of Congress a tract of land has been reserved from homestead and pre-emption, or dedicated to any special purpose, proceedings in the land department in defiance of such reservation or dedication, although culminating in a patent, transfer no title, and may be challenged in an action at law. In other words, the action of the land department cannot override the

expressed will of Congress, or convey away public lands in disregard or defiance thereof.

Smelting Co. vs. Kemp, 104 U. S., 636-646 (and other cases).

* * * * *

"Were the present case one where a reservation had been made by Act of Congress, there would be no question but the authorities last cited would be analogous and controlling upon this court. What distinction can there be, however, as a matter of principle, between a reservation from homestead of certain lands by Act of Congress, and a reservation from entry of lands by executive proclamation or departmental withdrawal? Is not the jurisdiction of the land department as effectively cut off in the one case as in the other?

* * * * * *

"Our inquiry is thus limited to the question of the power of the local land office officials to accept and give validity to an entry upon lands reserved from entry by the government, when the reservation is shown upon the records of the land office.

* * * * * *

"The question now under consideration was referred to by Mr. Justice Field in Smelting Co. vs. Kemp, 104 U. S., 636, at page 641 (26 L. Ed., 875, when he said:

" 'Of course, when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the department had jurisdiction to act and execute it; that is to say, in a case

where the lands belong to the United States, and provisions has been made by law for their sale. If they were never public property or had been previously disposed of, or if Congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the department would in that event be like that of any other special tribunal not having jurisdiction of a case which it had assumed to decide. Matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law. In such cases the objection to the patent reaches beyond the action of the special tribunal, and goes to the existence of a subject upon which it was competent to act.'

"In a proceeding entitled 'John Campbell,' before the Secretary of the Interior (6 Land Dec. Int., 317), it was held that: 'The President is vested with general authority in the matter of reserving land for public use, and land as set apart is not subject to disposition under the public land laws during the existence of such reservation.'

See also, John C. Irwin, 6 Land Dec. Dept. Int., 585.

"It is a settled rule of decision in the federal courts that, so long as an executive withdrawal of public lands continues in force, the lands covered thereby are no

subject to entry, and no lawful settlement on them can be acquired."

Wolsey vs. Chapman, 101 U. S., 755, 25 L. Ed., 915.

Bullard vs. Railroad, 122 U. S., 167, 7 Sup. Ct., 1140, 30 L. Ed., 1123.

Spencer vs. McDougal, 159 U. S., 62, 15 Sup. Ct., 1026, 40 L. Ed., 76.

"In conclusion, therefore, we are of the opinion that an attempted exercise of jurisdiction by the Land Department in the acceptance of an entry, including lands reserved from entry by the government, when the reservation from entry appears as a matter of record in the land office, is void, as to the lands reserved, for the reason that it is an assumption of power in excess of its jurisdiction, and the same can be shown by a defendant in an action at law.

"We conclude that the District Court committed error in refusing the instructions asked by appellant."

Applying the law enunciated in the two foregoing cases, to the facts of the case at bar, it would necessarily follow that the land department exceeded its jurisdiction in assuming to award a preference right of entry to a successful contestant of an entry on lands withdrawn from all forms of entry, and in giving validity to such so-called preference right, long after the statutory thirty days period after notice, by receiving and allowing the entry of Ocheltree and the entry of Bodkin, based on such preference right. It follows that the action of the local land officials on June 1, 1912, in receiving and

allowing such entries was without jurisdiction and void, and therefore, neither created nor conferred any right on Ocheltree or Bodkin, which was, or is, embraced in, or protected by, Section 19, of the Penal Code of the United States. It follows that the District Court erred in refusing the instruction requested by the plaintiffs in error, and in giving the two instructions hereinbefore noted and set forth in the assignment of errors herein. (Tr., pp. 91-93.)

It is conceded by all that during the period of withdrawal of lands under a first form reclamation withdrawal, no person can gain any rights under the land laws over any of such lands by settlement thereon. The Land Department recognizes and enforces this rule. (Case of Woodcock, *supra* 38 L. D., 349.) That being the case, how can a person obtain a right over the same land, while it is so withdrawn, by means of a contest of an entry thereon, and the preference right awarded as a result thereof? As long as the land remains withdrawn the preference right is "futile," it merely exists in theory, because it cannot be exercised so as to initiate title. Its life according to law is thirty days after notice. If not exercised within that time it expires, and there is no authority vested in the land department to prolong its legal existence, either by "suspension," as held in the case of Fairchild vs. Eby, nor by "reviving" it by a finding that the lands were withdrawn under a "misapprehension of facts," as held in the cases of Beach vs. Hansen, and Edwards vs. Bodkin.

If the settler who settles on the land itself, while still

withdrawn, and who is still settled on it when it is restored, can neither claim nor be granted any right whatever to enter said lands under the land laws by virtue of such settlement, superior to any other qualified citizen, how can one, who has a defunct preference right, claim or receive a right of entry by virtue thereof, which is recognized by law, or within the jurisdiction of the Land Department?

The same Act of May 14, 1880, which creates the preference right resulting from successful contest, with which we are herein dealing, also creates another preference right which is awarded to a settler.

"Sec. 3. That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States Land Office as is now allowed to settlers under the pre-emption laws to put their claims on record, and his right shall relate back to the date of settlement the same as if he settled under the pre-emption laws."

This settlers' preference right is fully recognized by the land department, as evidenced by its suggestions to homesteaders issued March 26, 1913, wherein these instructions are given.

"3. Claims under homestead laws may be initiated either by settlement on surveyed or unsurveyed lands of the kind mentioned in the foregoing paragraph, or by

the filing of a soldier's or sailor's declaratory statement, or by the presentation of an application to enter any surveyed lands of that kind."

"Settlement is initiated through the personal act of the settler placing improvements upon the land, or, establishing residence thereon; he thus gains the right to make entry for the land as against other persons. * * * * * Entry should be made within three months after settlement upon surveyed lands, or within that time after the filing in the local land office of the plat of survey of lands unsurveyed when settlement was made. Otherwise, the preference right of entry may be lost."

While we are not herein trying the private contests between the plaintiffs in error and Ocheltree and Bodkin, as to which have superior rights to the lands involved, yet it is interesting, as well as helpful, in arriving at a correct solution of the question herein to view the exact situation as it was presented to the land department when it rejected the entries of Culpepper and Edwards, and denied their preference rights as settlers, on June 1, 1912, at the same time giving validity to the so-called preference rights of Ocheltree and Bodkin by receiving and accepting their entries.

The entries of the former were *prima facie* valid as their declarations showed settlement after restoration and prior and down to entry. While the entries of the latter were *prima facie* void as shown by the records before the land office. And the action of the local land officers in giving them validity by receiving and allow-

ing them in the face of the records, was without jurisdiction and absolutely void, and hence no rights accrued to either Ocheltree or Bodkin, by reason thereof, which are embraced in, or protected by, section 19 of the Penal Code, and the District Court should have so instructed the jury.

We respectfully submit that the so-called preference rights of Ocheltree and Bodkin were void on May 18, 1910, and for some time prior thereto; that the local land officials exceeded their jurisdiction in receiving and allowing the Ocheltree and Bodkin entries thereunder on May 18, 1910; and further exceeded their jurisdiction in allowing their application on June 1, 1912, to enter the lands involved, as homesteads, respectively, under and by virtue of said preference rights; that such action by the local land officials was absolutely void and conferred no right on said Ocheltree or said Bodkin to make settlement or residence on the respective lands, and to cultivate the same so as to earn title to said lands, nor any right, embraced in, or protected by, section 19 of the Penal Code of the United States, under which the indictment herein is found.

Respectfully submitted.

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